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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1984

JAMES B. JENSEN, JR.; RICARDO S. TOMACRUZ; LEARJET PHILIPPINES, INC., a corporation; JAMES B. JENSEN & CO., INC., a corporation and HAMIX INTERNATIONAL, LTD., a corporation,

Petitioners,

v.

GATES LEARJET CORPORATION and GATES LEARJET EXPORT CORPORATION,

Respondents.

On Appeal from the Ninth Circuit
Court of Appeals

Appendix to Petition for Writ of Certiorari

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TO PETITION FOR WRIT OF CERTIORARI

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4	9/27/84	Opinion
5	11/27/84	Order

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GATES LEARJET CORPORATION and GATES LEARJET EXPORT CORPORATION,	NO. CIV 82-139 TUC ACM
Plaintiffs,	ORDER
vs.	
JAMES B. JENSEN, JR., RICARDO S. TOMACRUZ; LEARJET PHILIPPINES, INC., a corporation; JAMES B. JENSEN & CO., INC., a corporation, and HAMIX INTERNATIONAL, LTD., a corporation,	
Defendants.	

Plaintiffs Gates Learjet Corporation, and Gates Learjet Export Corporation have moved to amend the court's order of August 20, 1982. A review of the record reveals that prior to August 20th, James B. Jensen & Co., Inc. had been properly served, and therefore the court hereby amends its order insofar as it had quashed service on that defendant.

APPENDIX 1

Plaintiffs have since submitted proof of service upon defendant James Jensen, Jr. in the Republic of Philippines. The court is satisfied, pursuant to Fed.R.Civ.P. 4(i) (2) dealing with service in a foreign country, that service has been properly made on James Jensen, Jr.

Plaintiff's have also requested a ruling on defendant James B. Jensen & Co., Inc.'s motion to dismiss for lack of personal jurisdiction. The court has reviewed the information submitted in the pleadings, including the affidavits and discovery materials, and finds that there is sufficient basis for ruling on defendant James B. Jensen & Co., Inc.'s motion.

The plaintiffs, Gates Learjet Corporation, and Gates Learjet Export Corporation, are Delaware corporations authorized to transact business within the State of Arizona. Plaintiffs, herein

after called "GLC", have extensive manufacturing and marketing facilities located in Tucson, Arizona, where GLC also conducts annual distributorship conferences.

Defendant James B. Jensen & Co., Inc., hereinafter called "Jensen, Inc.", is a California corporation, with its principal place of business in a state other than Arizona, more specifically in San Francisco, California. The president of Jensen, Inc. is Mr. James Jensen, Jr., who on several occasions has traveled to GLC facilities in Tucson, Arizona.

On or about the last week in February 1978, Mr. Jensen traveled to Tucson, Arizona and discussed with GLC the possibility of becoming the GLC distributor for the Philippine area. Mr. Jensen states that none of his discussions with GLC concerned Jensen, Inc., and that a new

corporation would be formed in the event a distributorship was granted. Mr. Jensen also states that all negotiations relative to the distributorship were done by telephone, correspondence and telex from San FRancisco, and from Manila.

GLC maintains that on these occasions Mr. Jensen was acting in a multiple capacity, and a review of letters written by Mr. Jensen indicates such was the case. In a letter dated March 1, 1978, Mr. Jensen states ". . . my desire to actively sell Gates Learjets in the Philippines." In this letter, Mr. Jensen repeatedly uses the term "we" in discussing his capability to successfully market aircraft. This letter is written on Jensen, Inc. letterhead, and is signed in his capacity as president of Jensen, Inc. Nowhere in this letter is there mention of a new corporation; instead, Mr. Jensen

writes of another existing company, Aviation Specialist, Inc., which he personally owns, and which sells aircraft and aircraft parts.

Finally, in this letter, Mr. Jensen states that "they" are most anxious to get underway, needing only word from GLC, to start actively selling Gates Learjets in the Philippine area.

A letter dated March 20, 1978, written by Mr. Jensen in his capacity as president of Jensen, Inc. and on company letterhead, provides further evidence of Jensen, Inc.'s role. Mr. Jensen intermingles the terms "I" and "we" when referring to their marketing capability and selling activity. Again, there is no indication of a new corporation, whether in existence, or to be formed later.

There are additional letters, dated May 4, May 19, May 22, and May 25, 1978,

all dealing with the marketing operations in the Philippines, and written on Jensen, Inc. letterhead. Again Mr. Jensen uses the term "we" when discussion promoting and selling of GLC products.

The parties entered into a distributorship agreement, with the name of Learjet Philippines, Inc. shown as the distributor, on January 1, 1980. Learjet Philippines, Inc. is another defendant in this case and is a Philippine corporation, formed sometime in 1978. The president of Learjet Philippines is Mr. Jensen, and Jensen, Inc. holds a fifteen percent interest. A review of several letters from Mr. Jensen, signed in his capacity as president of Learjet Philippines, and on Learjet Philippines letterhead, reveals the degree of interrelationship between Jensen, Inc. and the new corporation.

In a October 12, 1978 letter, Mr. Jensen writes to GLC, Wichita, Kansas, requesting a discount for both Jensen, Inc. and Learjet Philippines and in which he refers to Jensen, Inc. as "Our San Francisco office".

He further asks, "I wish to request that your firm grant Learjet Philippines, Inc. and our U.S. affiliate company James B. Jensen & Co., Inc. the customary discounts you normally extend to your international distributors." One can reasonably conclude that Mr. Jensen himself considers Jensen, Inc. an active distributor of GLC products, working in concert with the names distributor, Learjet Philippines. This association is made clearer in another letter dated September 28, 1981, to GLC personnel in Tucson on Learjet Philippines letterhead, signed by Mr. Jensen as president.

He writes:

> In the filed of spares support Learjet Philippines as well as its U.S. purchasing arm, James B. Jensen & Co., Inc., purchased directly from Gates Learjet Corporation spares in the amount of U.S. dollars $75,544.68 in 1980 and $131,141.61 to date in 1981, all for its account in support of the Philippine fleet.

The fact that one sum is used for the purchasing activity of two companies, and all for the support of the Philippines fleet, which is the area of distributor responsibility under the agreement, buttresses the conclusion that Jensen, Inc. is an active member in the marketing activity which is the subject matter of the distributorship agreement.

The original distributorship was for a period of one year, and subsequently was extended for two years, and finally for an

additional period of four months. This agreement expired on April 30, 1981, and has not been extended or renewed by GLC. Plaintiffs' complaint, which was removed to this court on March 15, 1982, is based on four counts. Count one alleges continued use of GLC trade name and trademark in violation of the distributorship agreement termination; count two alleges abuse of process in the Philippines. Count three alleges interference with contractual and business relations, and count four alleges the defendants conspired to make unauthorized use of GLC trademark and name. For the purposes of determining personal jurisdiction over Jensen, Inc., counts one and four will be treated as asserting the same claim, i.e. unauthorized use of GLC trade name and trademark in violation of the agreement.

A federal court, in a diversity case such as the one at bar, has jurisdiction only if a court of the state in which the federal court is sitting would have jurisdiction. Fed.R.Civ.P. 4(e) and 4(d)(7). See 2 Moore's Federal Practice ¶4.41-1[1] and 4.32 [2] (2d ed. 1981). Jurisdiction over Jensen, Inc. must therefore be based upon Arizona's long-arm statute under Arizona Rule 4(e)(2). Traditionally, a two-tier analysis was used to determine whether a court had personal jurisdiction when using a state's long-arm statute. The first step was to determine if the defendant had qualified under the wording of the statute. If this requirement was met, the second step was to determine if exercise of jurisdiction satisfied constitutional due process standards. However, recent cases have held that where the state's long-arm

statute has been construed by the state court to establish jurisdiction to the maximum extent permitted by due process, the federal court need only consider whether asserting jurisdiction would violate due process. Insurance Co. of North America v. Marina Salina Cruz, 649 F.2d 1266, 1269 (9th Cir. 1981). This approach is available to this court as the Supreme Court of Arizona has stated that Rule 4(e)(2) is intended to permit the exercise of personal jurisdiction over non-residents to the full extent of the law. Houghton v. Piper Aircraft Corp., 112 Ariz. 307, 542 P.2d 24 (1975).

In assessing whether exercise of personal jurisdiction over Jensen, Inc. would violate due process, we must look to the standards established by the Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945); Hanson

v. Denckla, 357 U.S. 235 (1958); and World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286 (1980). The Ninth Circuit, with these cases in mind, first looks to the quantity and quality of defendants' activities. It the defendants' activities within the state are substantial, or continuous and systematic, the minimum contacts standard is satisfied to establish general jurisdiction, and therefore the cause of action need not arise from the defendants' forum-related activities. Data Disc, Inc. v. Systems Technology Assoc's., Inc., 557 F.2d 1280, 1287 (1977); Swensen v. Murchison, 507 F.Supp.-509, 511 (N.D.Cal. 1981). Jensen, Inc. does not transact business within Arizona on a continuous or systematic basis, and does not provide the kind of contacts that would sustain exercise of general jurisdiction.

In Data Disc., supra, the Ninth Circuit further refined personal jurisdiction analysis and held that where general jurisdiction does not lie, the court must examine each cause of action or claim separately and determine whether it has jurisdiction on that claim. Id. at 1287, 1288. The Ninth Circuit developed a three part analysis to apply where the nonresident defendant's activities with the state do not permit general jurisdiction. Id. at 1287.

1. The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum.
2. The claim must be one which arises out or results from the

defendant's forum-related activities.

3. The exercise of jurisdiction must be reasonable. Id.

COUNT ONE AND COUNT FOUR

As stated earlier, the basis of these claims is the unauthorized use of GLC trade name and trademark, in violation of the termination of the distributorship agreement. These claims flow directly from the distributorship agreement. The distributorship agreement was entered into only after a lengthy and thorough negotiation process, during which Jensen, Inc., through its president, participated fully. Defendant's forum related activities satisfy part one of the Data Disc test. Part two is also satisfied by the fact that, as stated above, counts one and four arise out of the termination of the agreement, an agreement which is the

direct result of defendant's forum related activity. Part three of Data Disc is likewise satisfied. Jensen, Inc. aggressively solicited the distributorship contract, conducting a well-planned and persuasive promotional campaign to secure the distributorship from GLC. Defendant, therefore, "purposefully availed himself of the privilege of conducting" its working relationship with GLC within Arizona, not only in person, but through the mail, telephone and wire service. Swensen v. Murchison, supra, at 513. As to count one and four, the court has jurisdiction over defendant Jensen, Inc.

COUNT TWO AND COUNT THREE

These claims sound in tort law, and need to be examined with regard to both the conduct that gave rise to the claim, and the injury that resulted therefrom. See Data Disc, Inc. v. Systems Technology

Assoc.'s, Inc., supra, at 1288. Defendant's conduct, with respect to count two, cannot be said to have taken place in Arizona. Plaintiff alleges that defendant caused the property of plaintiff in the Philippines to be seized, and cause the arrest, in the Philippines, of one of plaintiff's employees. Count two also alleges that defendant has filed two civil actions in the Phillippines, all for the purposes of harassing, intimidating and threatening the plaintiffs. Not only has all the conduct giving rise to this claim occurred in the Philippines, but the injury if any has occurred there. Both part one and two of Data Disc, where the "claim must arise out of or result from the defendant's forum related activities," are not satisfied. Even if plaintiff could argue that some injury has occurred in Arizona as result of defendant's

conduct without the state, due process would not be satisfied. Cf. Northern Propane Gas Co. v. Kipps, 127 Ariz. 522, 622 P.2d 469 (1980) (negligence action, where one of injured parties was resident of Arizona).

In count three plaintiffs allege defendant deliberately interfered with the contractual and business relations of the plaintiffs and their potential customers by threatening and intimidating potential customers of the plaintiffs. This claim similarly fails to satisfy the requirements of Data Disc. No tortious activity can be considered to have occurred within the forum if the conduct and harm occurred outside the state. See Lehigh Valley Industries v. Birenbaum, 527 F.2d 87, 94 (2d Cir. 1975). In the case at bar, if there was a loss of customers, it was

clearly customers in the area of the Philippines, and not in the forum state.

The principal contact relied upon by GLC is the activities defendant engaged in while procuring the distributorship. We have already discussed how such a relationship as existed between Jensen, Inc. and the other defendants gave rise to jurisdiction over claims directly related to the agreement, such as disputes over termination thereof as in counts one and four. But the claims of counts two and three, sounding in tort law, cannot be said to arise out of the distributorship agreement. These claims result from the conduct of defendant outside the state, and are too attenuated a contact to justify exercise of personal jurisdiction. Therefore,

IT IS ORDERED that defendant Jensen, Inc.'s motion to dismiss for lack of

personal jurisdiction is denied as to counts one and four and granted as to counts two and three.

DATED this 23 day of September, 1982.

ALFREDO C. MARQUEZ
United States District
Judge

Copies mailed this date to:

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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Civil Case No. CIV-82-139-TUC-ACM

Date May 31, 1983

Title: GATES LEARJET CORP. vs. JAMES B. JENSEN, et al.

Present: HON. ALFREDO C. MARQUEZ JUDGE

Renee Ludeke
Deputy Clerk

Gus Rico
Court Reporter

ATTORNEYS FOR PLAINTIFF(s)
William H. Tinney
Michael Rusing

ATTORNEYS FOR DEFENDANT(s)
Gary F. Howard

Proceedings: X Open Court

PLTFS' MOTION TO COMPEL AND FOR SANCTIONS; DEFTS' MOTION TO DISMISS

Hearing had. IT IS ORDERED that all new discovery is stayed until further order of the Court. Counsel are directed to file a written request for any further

discovery setting forth purpose of discovery; witnesses to be deposed, etc.

Court's order of September 23, 1982 is clarified to reflect that Counts 2 and 3 are dismissed as to all parties named in those counts.

IT IS ORDERED that the Clerk is to accept for filing the depositions of James B. Jensen, Jr. and Ricardo S. Tomacruz in this case.

IT IS FURTHER ORDERED that the Motion to Compel Answers to the Interrogatories is granted; Motion to Compel re the San Francisco Depositions is taken under advisement.

IT IS FURTHER ORDERED that all further discovery motions to be filed in this case are to be heard in this court.

IT IS FURTHER ORDERED that the motion for sanctions is granted. Defendants are ordered to pay the sum of $500.00 in

attorneys fees pursuant to Rule 37. Plaintiffs are directed to file an affidavit re time spent in support of the motions for sanctions. Defendants have five (5) days to respond to the affidavit. The order for sanctions will stand until receipt of affidavit and opposition at which time the court will make a final determination.

IT IS FURTHER ORDERED that the motion to dismiss is denied with leave to renew.

Counsel are further directed to notify each other by letter with a copy to the court of which paragraphs they have complied with in the stipulation entered into which was filed on May 9, 1983.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

GATES LEARJET CORPORATION and GATES LEARJET EXPORT CORPORATION, Plaintiffs, vs. JAMES B. JENSEN, JR.; RICARDO S. TOMACRUZ; LEARJET PHILIPPINES, INC., a corporation; JAMES B. JENSEN & CO., INC., a corporation, and HAMIX INTERNATIONAL LTD., a corporation, Defendants.	No. CIV 82-139 TUC ACM
JAMES JENSEN, JR.; RICARDO S. TOMACRUZ; and LEARJET PHILIPPINES, INC., a corporation, Counterclaimants, vs. GATES LEARJET CORPORATION; GATES LEARJET EXPORT CORPORATION; B.S. STILLWELL and JANE DOE STILLWELL, husband and wife; and STILLWELL AVIATION AUSTRALIA PTY., LTD., Counterdefendants.	MEMORANDUM OF DECISION AND ORDER

APPENDIX 3

Gates Learjet Corporation [GLC] is a manufacturer of jet aircraft. Gates Learjet Export Corporation (GLEC) is a corporation organized to handle international sales for Gates Learjet. Defendant James B. Jensen, Jr. is a resident of California and the Philippines. Defendant Tomacruz is a citizen and resident of the Philippines. Defendant Learjet Philippines, Inc. (Lear Phil) is a nonresident foreign corporation established pursuant to the laws of the Philippines with its principal offices in Manila. Defendant James B. Jensen & Company, Inc. (Jensen, Inc.) is a California corporation whose principal place of business is San Francisco, California. Defendant Hamix International Ltd. (Hamix) is a nonresident foreign corporation whose principal

place of business is Hong Kong, British Crown Colony.

The complaint [Count One] alleges that on January 1, 1980, Jensen and Tomacruz on their own behalf and on behalf of Lear Phil, Jensen, Inc. and Hamix entered into an international distributor's agreement, whereby Lear Phil would become the distributor of Learjet Aircraft in the Philippines for one year. Plaintiff alleges that the agreement expired on April 30, 1981, and was not thereafter renewed or extended, that in spite of the termination of the agreement the defendants Lear Phil, Jensen and Tomacruz wrongfully continued to represent themselves as distributors or agents for the plaintiffs and to use the plaintiffs' exclusive trade names and trademarks for their own benefit and for the purpose of confusing potentional Gates Learjet

customers to the detriment of the plaintiffs. Plaintiffs allege that Hamix and Jensen, Inc. are corporations formed by the defendants Jensen, Tomacruz and Lear Phil and are mere conduits through which the other defendants conduct their business and hide their assets and any judgment awarded to plaintiffs should be awarded against these corporations.

Counts Two and Three allege that the defendants Lear Phil, Jensen and Tomacruz have filed two civil actions and one criminal complaint in the Republic of the Philippines against the plaintiffs; have repeatedly caused property of the plaintiffs to be seized in the Philippines; have caused the arrest of an employee of the plaintiff; that these actions were solely for the purpose of harassing, intimidating and threatening the plaintiffs and constitute an abuse of process;

that defendants Jensen and Tomacruz have threatened and intimidated potential customers of the plaintiffs by threatening to join those customers in the vexatious litigation and that the defendants Jensen and Tomacruz have thereby deliberately interfered with the contractual and business relations of the plaintiffs and their potential customers. Counts Two and Three were dismissed by the court because all of the acts alleged in those counts occurred in the Philippines.

Count Four alleges that the defendants Jensen, Tomacruz, Lear Phil, Jensen, Inc. and Hamix conspired to make unauthorized use of the trademark and the name of the plaintiffs, and that the use tends to confuse the public into believing that the defendant's business is in some way connected with the business of the plaintiffs.

The complaint prays for an order restraining the defendants from continuing the practice as set forth in the complaint, for damages and costs and attorney's fees.

The defendants, James Jensen, Jr., Tomacruz, and Lear Phil have filed counterclaim naming the plaintiffs and B.S. Stillwell and Jane Doe Stillwell, husband and wife, and Stillwell Aviation Australia, Ltd., as additional parties in the counterclaim. The counterclaim contains six counts. Counts One through Four allege a wrongful termination of the distributorship agreement, wrongful interference with the customers of the counterclaimants, unjust enrichment, etc. All of these acts alleged in the counterclaim apparently occurred in the Philippines. Count Five involves a contract between Hamix and GLC and GLEC for a Gates

Learjet Aircraft. It alleges a breach of contract by GLC and GLEC. Count Six alleges that the counterdefendants, acting through various agents and employees, have informed customers of Lear Phil that Lear Phil, Jensen and Tomacruz were not honorable, honest and qualified to market Learjet aircraft. It alleges that this was done maliciously and prays for compensatory and punitive damages for the libel and slander. These acts also appeared to have occurred in the Philippines.

The defendants have asked that the court dismiss the plaintiff's complaint and all of the counterclaimant's claims against the counterdefendants, with the exception of Count Five of the counterclaim. The motion to dismiss is based on forum non conveniens.

The defendants, in their motion, asked that the action be dismissed on the following conditions:

1. That the courts of the Republic of the Philippines have and/or will assert jurisdiction to adjudicate the claims alleged in the actions being dismissed;

2. That the defendants consent to submit themselves to the personal jurisdiction of the appropriate courts of the Republic of the Philippines;

3. That the defendants make their employees available as witnesses to testify in the Republic of the Philippines;

4. That the defendants waive any statute of limitations defenses which might have arisen during the pendency of the actions in this court;

5. That the defendants recognize any

judgment rendered by the appropriate court of the Republic of the Philippines.

6. That depositions and documents produced so far in this action and answers to interrogatories may be used in the Philippines action, subject to objections which could be made to those products of discovery in this court. Defendants ask that the court retain jurisdiction of Count Five, (the contract for sale of a jet aircraft between Hamix and GLC and GLEC). This count is entirely unrelated to the other counts of the complaint and the counterclaim.

At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement must be satisfied when the defendant is "amenable to process" in the other jurisdiction. Gulf Oil Corporation

v. Gilbert, 67 S.Ct. 839 (1947). Plaintiffs, in their opposition to the motion, do not question that there is an alternative forum. The defendants are willing to submit themselves to the jurisdiction of the appropriate court of the Philippines and recognize any judgment rendered by such a court. They further consent to make their employees available as witnesses to testify in any action in a Philippines court.

Plaintiffs refer to the presently existing unstable situation in the Philippines and contend that a court should not send American plaintiffs to litigate disputes in a forum where there is a serious question as to the type of justice they would receive. They also allege that there are grave doubts as to the safety of American witnesses, attorneys, etc.

Any dismissal by this court would be a conditional dismissal. If the plaintiffs, later on in the litigation, feel that because of the political unrest in the Philippines they are being deprived of a fair trial they can ask this court to set aside the conditional dismissal and take jurisdiction of the claims.

The Supreme Court has set out a balancing test to be used by district courts in deciding whether or not an action should be dismissed on the ground of forum non conveniens, Gilbert, supra; Koster v. Lumbermen's Mut. Cas. Co., 67 S.Ct 828 (1947). In those decisions, the Supreme Court stated that a plaintiff's choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would "establish . . . oppressiveness and

vexation to a defendant out of all proportion to the plaintiff's convenience," or when the "chosen forum (is) inappropriate because of considerations affecting the court's own administrative and legal problems," the court may, in the exercise of its sound discretion, dismiss the case. Piper Aircraft Co. v. Reyno, 102 S.Ct. 252 (1981). To guide the trial court's discretion, the Court provided a list of "private interest factors" affecting the convenience of the litigants, and a list of "public interest factors" affecting the convenience of the forum. The factors pertaining to the private interest of the litigants included the "relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses, the cost of obtaining attendance of willing witnesses, possibility of viewing the

premises, if view would be appropriate to the action, and all other practical problems that make trial of a case easy, expeditious, and inexpensive.

The "public interest factors" included the administrative difficulties flowing from the court's congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the problems and conflicts of law, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty. Id. at 258, n.6.

As pointed out above, the plaintiffs allege that defendants Lear Phil, Tomacruz and Jensen filed two civil suits and one criminal suit in the Philippines. In Civil case No. 43874, Lear Phil is the

plaintiff, GLC and GLEC are the defendants.

The complaint was filed on December 1, 1981. The plaintiffs filed their action in the District of Arizona on February 3, 1982.

A review of the pleadings in Cause No. 43874 reveals that it involves the alleged wrongful termination of the distributorship, interference with customers, unjust enrichment of the prior efforts of Lear Phil in promoting GLC products in the Philippines, and damages to reputations.

These are the same allegations of the counterclaim filed in the Arizona action [except for the Hamix Court].

GLC and GLEC have filed an answer and counterclaims in the Philippine action. The counterclaim also concerns the termination of the distributorship.

The record reflects another action filed on January 18, 1981 in the Philippines in which Tomacruz and Jensen, Jr. are plaintiffs and B.S. Stillwell, John Benson, Michael Fahey, GLC and GLEC are defendants. This action also deals with the same subject matter as the counterclaims in the Arizona action.

A review of the record in the Arizona action and the pleadings in the pending Philippine actions makes it abundantly clear that the vast majority of the witnesses reside in the Philippines and almost all of the acts alleged in the complaints and counterclaims occurred in the Philippines.

The factors pertaining to the private interests of the litigants weigh heavily in favor of dismissing the action on the grounds of forum non-conveniens.

This is especially true when there is pending litigation in the foreign forum which was filed before the plaintiffs filed their complaint in Arizona.

The public interest factors also weigh heavily in favor of a dismissal.

Counsel have indicated that there are hundreds, if not thousands, of exhibits involved. There will be many witnesses testifying for both sides. The case will take weeks to try.

The Tucson division of the District of Arizona is presently operating with two district judges. Normally there are three judges in the division. The two judges are handling all the criminal calendar. Outside judges have been assigned to handle part of the civil calendar and it is contemplated that more help will be necessary in the future.

It would be unfair to burden citizens with extended jury duty when this district has such a minor connection with the controversies.

Because most of the operating facts occurred in the Philippines, that country has a substantial interest in the outcome of the litigation.

Aside from the political unrest, plaintiffs do not contend that Philippine law will be less favorable.

The controversies will require the application of Arizona law and Philippine law. There is no reason to believe that this court is better equipped to apply Philippine law than a Philippine court applying Arizona law.

The court finds that trial in this district would impose a heavy burden on the parties and the court.

After considering all of the factors relating to public and private interests, the court is convinced the motion to dismiss should be granted.

IT IS ORDERED:

1. That the plaintiffs' Complaint is dismissed on the following conditions.

(a) That the courts of the Philippines accept jurisdiction to adjudicate the plaintiffs' claims.

(b) That the defendants submit to the jurisdiction of the appropriate court in the Philippines.

(c) That the defendants make their employees available for process and as witnesses in the Philippines.

(d) That defendants waive any statute of limitations defenses which might have arisen during the pendency of the actions in this court.

(e) That defendants recognize any judgment rendered by a court in the Philippines.

(f) All discovery and the products may be used in any action in the Philippines - subject to objections which could be made in this court.

2. The defendants' counterclaims, except for the Hamix count, are dismissed.

The complaint and the counterclaims are all interrelated. Resolution of the plaintiffs' claims would, in effect, resolve the defendants' counterclaims. If, for some unforeseen reason the counterclaims cannot be resolved in the Philippine litigation, this court will entertain a motion by the defendants to reinstate the counterclaims that this court has jurisdiction to hear.

The court has pending two motions for attorneys' fees.

IT IS ORDERED:

1. The plaintiffs' Motion for Attorney's Fees re: Motion to Strike GLC/GLEC's Answer to Counterclaim is denied.

2. The previous order awarding plaintiffs' attorney's fees in the sum of $500 is re-affirmed.

In view of the court's ruling on the Motion to Dismiss for forum non conveniens, there is no need for the court to rule on any other pending motions.

Dated this 1st day of November, 1983.

_____

ALFREDO C. MARQUEZ
United States District Judge

Copies mailed this date to:

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GATES LEARJET CORPORATION and GATES LEARJET EXPORT CORPORATION,	)	
Plaintiffs-Appellants,	)	No. 83-2643
vs.	)	OPINION
JAMES B. JENSEN, JR.; RICARDO S. TOMACRUZ; LEARJET PHILIPPINES, INC., a corporation; JAMES B. JENSEN & CO., INC., a corporation, and HAMIX INTERNATIONAL, LTD., a corporation,	)	
Defendants-Appellees.	)	

William H. Tinney, Michael J. Rusing, Bilby, Shoenhair, Warnock & Dolph, Tucson, Ariz., for plaintiffs-appellants.

D. Michael Mandig, John F. Molloy, Molloy, Jones, Donahue, Trachta, Childers & Mallamo, P.C., Tucson, Ariz., for defendants-appellees.

Appeal from the United States District Court for the District of Arizona.

Before CHOY, PREGERSON and REINHARDT, Circuit Judges.

CHOY, Circuit Judge:

The issues on this appeal are (1) whether the district court properly dismissed counts two and three of appellant's complaint for lack of personal jurisdiction, and (2) whether the district court's dismissal of counts one and four for forum non conveniens was an abuse of discretion. On both issues, we reverse and remand to the district court.

I. BACKGROUND

Gates Learjet Corporation and Gates Learjet Export Corporation ("Gates") entered into an international distributorship agreement with Learjet Philippines, Inc. ("LPI") in 1978. Gates, principally located in Tucson, Arizona, manufactures executive aircraft known as Learjets. LPI is a Philippine corporation. The original agreement was for a period of one year but was renewed for an

additional two years and four months.

James B. Jensen, Jr., a United States citizen with residence in California and the Philippines, is the president of LPI and James B. Jensen & Co. ("Jensen, Inc."), a California corporation located in San Francisco. The negotiations for the international distributorship agreement occurred both in Tucson, when Jensen visited Gates, and by telephone, correspondence, and telex from Tucson to Manila and San Francisco. The agreement provides that it "is an Arizona agreement and that it shall be governed by the laws of the State of Arizona of the United States of America in all matters, included but not limited to, validity, obligation, interpretation, construction, performance and termination."

During the time the agreement was in effect, Jensen and Ricardo S. Tomacruz,

the vice-president and general manager of LPI and a citizen and resident of the Philippines, made several trips to Tucson on behalf of LPI. The purposes of Jensen's visits, which numbered at least seven between February 1978 and September 1981, included arrangement of an aircraft sale, meetings with Gates' employees, and attendance at Gates' international distributor conference and the delivery of several airplanes. LPI also entered into several airplane purchase agreements with Gates in Tucson. Each agreement contained a choice of law provision specifying Arizona and a choice of forum provision that the "courts of Arizona shall have exclusive jurisdiction to hear and determine all claims, disputes, actions, or suits which may arise hereunder." In addition, LPI and Jensen, Inc. purchased over $200,000 in spare parts from Gates.

In 1981, Gates did not renew the international distributorship agreement with LPI. On February 3, 1982, Gates filed a four-count complaint in an Arizona state court against Jensen, Tomacruz, LPI, Jensen, Inc., and Hamix International Ltd., a Hong Kong corporation ("defendants"). Count one of the complaint alleges unauthorized use of Gates' tradenames and trademarks. Count two alleges abuse of process arising out of the seizure by Philippine authorities of a Gates' aircraft and the jailing of its pilot. Count three alleges interference with contractual relations between Gates and customers in the Philippines. Count four alleges a conspiracy to make unauthorized use of Gates' tradename and trademark. The action was removed to a federal district court for diversity of

citizenship.

On September 23, 1982, the United States District Court for the District of Arizona dismissed counts two and three for lack of personal jurisdiction as to one of the defendants, Jensen, Inc. Gates Learjet Corp. v. Jensen, No. CIV 82-139 (D.Ariz. Sept. 23, 1982) (Gates Learjet I). After this partial dismissal, the defendants answered the complaint and filed a six-count counterclaim. The counterclaim alleges improper termination of the distributorship agreement, unjust enrichment, interference with contractual relations, and defamation. It added three parties to the litigation: B.S. Stillwell, Jane Doe Stillwell, and Stillwell Aviation Australia Party, Ltd. On May 31, 1983, the district court clarified its earlier dismissal order and dismissed counts two and three as to all of the

defendants.

On October 5, 1983, after 18 months of trial preparation, the defendants challenged the convenience of the forum. The defendants allege that two civil actions pending in Philippine courts make the same allegations as the action brought by Gates in Arizona. On November 1, 1983, the district court conditionally dismissed counts one and four of the complaint under the doctrine of forum non conveniens. The court dismissed Gates' complaint on the following conditions: 1) The Philippine courts accept jurisdiction; 2) the defendants submit to that jurisdiction; 3) the defendants make their employees available for process and as witnesses; 4) the defendants waive any newly arisen statute of limitations defenses; 5) the defendants recognize any Philippine court judgment; and 6) all discovery and

products may be used in any action in the Philippines, subject to objections which could be made in this court. Gates Learjet Corp. v. Jensen, No. CIV 82-139, slip op. at 11 (D.Ariz. Nov. 1, 1983) (Gates Learjet II).

II. DISCUSSION

A. Personal Jurisdiction

(1) The district court dismissed counts two and three of Gates' complaint for lack of personal jurisdiction. As the party seeking to invoke the jurisdiction of the court, Gates has the burden of establishing personal jurisdiction. Data Disc, Inc. v. Systems Technology Associates, Inc., 557 F.2d 1280, 1285 (9th Cir.1977).-1 Arizona's long-arm statute estab-

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1 Gates contends that the defendants waived any objection to personal jurisdiction when they invoked the jurisdiction of this court by asking for affirmative relief in a permissive counterclaim. The courts are divided on the issue of whether the assertion of a permissive counterclaim should constitute a waiver of a jurisdictional defense. Compare North Branch Products, Inc. v. Fisher, 284 F.2d 611, 615 (D.C.Cir.1960) (waiver) and Merz v. Hemmerle, 90 F.R.D. 566, 569 (E.D.N.Y.1981) (waiver) with Neifeld v. Steinberg, 438 F.2d 423, 427 (3d Cir.1971) (no waiver) and Lomanco, Inc. v. Missouri Pacific Railroad Co., 566 F.Supp. 846, 851 (E.D.Ark.1983) (no waiver). See generally Annot., 17 A.L.R.Fed. 390 (1973). Although this

court has held that the defendant's assertion of a compulsory counterclaim "does not constitute a waiver of any jurisdictional defense he previously or concurrently asserts," Dragor Shipping Corp. v. Union Tank Car Co., 378 F.2d 241, 244 (9th Cir.1967), we have not decided whether the assertion of a permissive counterclaim constitutes a waiver. As to defendant Jensen, Inc., this case is easily resolved because Jensen, Inc. brought a motion to dismiss for lack of personal jurisdiction prior to the filing of the answer and counterclaim. See Neifeld v. Steinberg, 438 F.2d at 428 n. 10 (clearly no waiver when jurisdictional defenses raised by motion prior to filing of answer). The other defendants, however, did not raise the jurisdictional defense until they filed their answer and counter claim. Nevertheless, we hold that the filing of a permissive counterclaim does not constitute a waiver of a personal jurisdiction defense asserted in the same pleading. Rule 12(b) of the Federal Rules of Civil Procedure implicitly authorizes a defendant to join a jurisdictional defense with a counterclaim without waiving this defense. The rule permits a defendant to raise jurisdictional defenses by motion or by answer. If we were to find a waiver when a defendant files a permissive counterclaim in the same pleading in which he asserts jurisdictional defenses, the purposes behind Rule 12(b)--to avoid the delay caused by successive motions and pleadings and to reverse the prior practice of asserting jurisdictional defenses by "special appearances"-- would

lishes personal jurisdiction over non-residents to the maximum extent permitted by due process. Houghton v. Piper Aircraft Corp., 112 Ariz. 365, 542 P.2d 24, 26 (1975). Due process requires the defendants to have certain minimum contacts with the forum so that maintenance of the suit does not offend traditional notions of fair play and substantial justice. International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945); Colonial Leasing Co. v. Pugh Brothers Garage, 735 F.2d 380, 383 (9th Cir.1984). To satisfy this due process requirement, Gates may prove "general jurisdiction" or "limited

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be thwarted. See Neifeld v. Steinberg, 438 F.2d at 429. Moreover, courts have noted that when the rule makers wanted to attach "waiver" consequences in certain situations, they did so explicitly. See id. at 428 & n. 11; Lomanco, Inc. v. Missouri Pacific Railroad Co., 566 F.Supp. at 850.

jurisdiction."

1. General Jurisdiction

(2) A sufficient relationship between the defendants and Arizona exists to support general jurisdiction if Gates can demonstrate that the defendants' activities within Arizona are "substantial" or "continuous and systematic." See Data Disc, Inc. v. Systems Technology Associates, Inc., 557 F.2d at 1287. We review the district court's holding that Jensen "does not transact business within Arizona on a continuous or systematic basis, and does not provide the kind of contacts that would sustain exercise of general jurisdiction." Gates Learjet I, slip op. at 7.

Gates cites five activities to prove that defendants' contacts with Arizona were "continuous and systematic" and "substantial": 1) Jensen solicited the

distributorship agreement in Arizona; 2) the defendants visited Tucson a number of times; 3) the airplane purchase agreements between Gates and Jensen contained an Arizona choice of law and forum provision; 4) the defendants purchased spare parts from Gates in Tucson; and 5) the defendants sent many letters and telexes and made numerous telephone calls to Tucson.

(3)(4) We must decide whether these contacts constitute sufficient activity in Arizona to conclude that the defendants "may in fact be said already to be 'present' there." Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 413 (9th Cir.1977). Moreover, we must focus upon the "economic reality" of the defendants' activities rather than a mechanical checklist. See Thos. P. Gonzalez Corp. v. Consejo Nacional, 614

F.2d 1247, 1254 (9th Cir.1980) (quoting Foster v. Mooney Aircraft Corp., 68 Cal.App.3d 887, 137 Cal.Rptr. 694, 697 (1977)).

(5)(6)(7)(8) We conclude that the "economic reality" here is that defendants' activities in Arizona were not "continuous and systematic" or "substantial". Jensen's solicitation of the distributorship agreement in Arizona and the defendants' visits to Tucson do not constitute "conducting business" in Arizona. See Rocke v. Canadian Automobile Sport Club, 660 F.2d 395, 399 (9th Cir.1981). Making telephone calls and sending telexes and letters to Tucson are not activities which support a finding of general jurisdiction. See Thos. P. Gonzalez Corp. v. Consejo Nacional, 614 F.2d at 1254. Furthermore, the choice of forum provision in the airplane purchase

agreement applies only to disputes arising out of those agreements. Significantly, the defendants did not establish a regular place of business in Arizona. See Rocke v. Canadian Automobile Sport Club, 660 P.2d at 399. These contacts in their totality do not demonstrate sufficient activity in Arizona to support general jurisdiction. Defendants' activities in Arizona were more occasional than continuous, and more infrequent than systematic.

2. Limited Jurisdiction

(9) If a defendant's activities are not so pervasive to subject them to general jurisdiction, this court makes the following evaluation in determining whether there is limited jurisdiction:

(1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposely avails himself

of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.

(2) The claim must be one which arises out of or results from the defendant's forum-related activities.

(3) Exercise of jurisdiction must be reasonable.

Data Disc, Inc. v. Systems Technology Associates, Inc., 557 F.2d 1280, 1287 (9th Cir.1977).

(10) Gates clearly satisfies the first prong of this test. Not only did Jensen solicit the distributorship agreement in Arizona, but also the agreement specifically provides that Arizona law governs it. The distributorship agreement, therefore, directly invokes the benefits and protections of Arizona laws. See O'Hare International Bank v. Hampton, 437 F.2d 1173, 1177 (7th Cir.1971);

Alchemie International, Inc. v. Metal World, Inc., 523 F.Supp. 1039, 1054 (D.N.J.1981). Given these circumstances, Jensen should have reasonably anticipated "being haled into court" in Arizona. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980).

Prong two of the Data Disc inquiry requires that each claim "arises out of or results from" the defendants' forum related activity. 557 F.2d at 1287. The district court had the most trouble with this part of the test, stating:

> The claims of counts two and three, sounding in tort law, cannot be said to arise out of the distributorship agreement. These claims result from the conduct of defendant outside the state, and are too attenuated a contact to justify exercise of personal jurisdiction.
>
> Gates Learjet I, slip op. at 10. After examining the record, we conclude that the district court erred in finding that the claims

> in counts two and three are "too attenuated a contact" to justify the exercise of personal jurisdiction.

(11) Count two of Gates' complaint alleges that the defendants filed two civil actions and one criminal complaint in the Philippines which caused the seizure of one of Gates' Learjets and the arrest of one of its employees. Count two alleges further that these actions were meant to harass, intimidate and threaten Gates and constitute an abuse of process.

At first blush, this count may appear to be unrelated to the distributorship agreement. An examination of the complaint that the defendants filed in the Philippines on December 1, 1981, however, dispels any doubt that this count "arises out of" the distributorship agreement.

The first cause of action in the Philippines complaint alleges that Gates' nonrenewal of the distributorship agreement with the defendants was "clearly contrary to law, morals, good customs, public policy and public order." The second cause of action alleges "moral" and reputation damages for Gates' bad faith in refusing to renew the distributorship agreement. The third cause of action alleges wanton and fraudulent behavior in refusing to negotiate the renewal of the distributorship agreement. Thus, count two of Gates' complaint arose out of the distributorship agreement because its termination induced defendants' alleged harassment and intimidation of Gates. Count two was not too attenuated from the distributorship agreement to support a finding of limited jurisdiction.

(12) We similarly conclude that count

three of Gates' complaint satisfies the second prong of the Data Disc test. Count three alleges that the defendants interfered with Gates' contractual relations with its customers in the Philippines. This count also arises out of the distributorship agreement because its factual basis concerns whether Jensen improperly used Gates' tradenames contrary to the terms of the distributorship agreement.2

The third and final prong of the Data Disc inquiry requires a court's exercise

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2 Gates cites cases that interpret an Arizona attorney's fee statute and hold that tort claims arise out of a contract if they could not exist "but for" the contract. See, e.g., Sparks v. Republic National Life Insurance Co., 132 Ariz. 529, 544, 647 P.2d 1127, 1141 (1982), cert. denied, 459 U.S. 1070, 103 S.Ct. 490, 74 L.Ed.2d 632. Although these cases interpret the "arises out of" language in a manner that supports Gates' construction, Gates never demonstrates why this court, in applying a constitutional due process test, should adopt an Arizona court's interpretation of an irrelevant state statute.

of jurisdiction to be reasonable. 557 F.2d at 1287. This court has identified seven factors as pertinent to the reasonableness inquiry:

(A) the extent of the defendant's purposeful interjection into the forum state;

(B) the burden of defending in the forum state; (C) the extent of the conflict with the sovereignty of the defendant's state;

(D) the forum state's interest in adjudicating the dispute;

(E) the most efficient judicial resolution of the controversy;

(F) the importance of the forum to the plaintiff's interest in convenient and effective relief; and

(G) the existence of an alternative forum.

Rocke v. Canadian Automobile Sport

Club, 660 F.2d 395, 399 (9th Cir.1981); see Insurance Co. of North America v. Marina Salina Cruz, 649 F.2d 1266, 1270 (9th Cir.1981). "These factors are not mandatory tests, each of which plaintiff must pass in order for a court properly to assume jurisdiction. Instead, the factors illuminate the considerations of fairness and due process set forth in International Shoe, 326 U.S. at 310 (66 S.Ct. at 154)." Hedrick v. Daiko Shoji Co., Ltd., Osaka, 715 F.2d 1355, 1359 (9th Cir.1983).

The application of these factors to this case convinces us that it would be reasonable to subject the defendants to the jurisdiction of the Arizona court. We consider each of the factors in turn.

(13) Although not extensive enough to support general jurisdiction, the contacts of LPI, Jensen, and Tomacruz with Arizona are sufficient to demonstrate a purposeful

interjection into the forum state. Jensen solicited an international distributorship agreement in Tucson, which contained a choice of law provision specifying Arizona. Both Jensen and Tomacruz made several visits to the Gates' facilities and even accepted delivery of airplanes in Tucson. Moreover, these airplane purchase agreements contained choice of law and forum provisions, both of which specified Arizona. Thus, the terms of important contracts between Gates and the defendants demonstrate that the defendants had notice that they might be brought into a court in Arizona.

(14) The burden on the defendants of defending in Arizona, as opposed to the Philippines, is potentially significant. Litigating abroad imposes significant inconveniences upon the party appearing in a foreign country. Olsen By Sheldon

v. Mexico, 729 F.2d 641, 650 (9th-Cir.1984). We nevertheless conclude that the burden on the defendants would not be substantial here, primarily because the defendants must litigate in Arizona anyway. The district court found personal jurisdiction as to counts one and four. The extra burden of defending counts two and three in Arizona, particularly in light of their connection to counts one and four, would be minimal.

(15)(16) The reasonableness of jurisdiction depends also in part upon the seriousness of the potential affront to the sovereignty of the defendants' state. A foreign nation presents a higher sovereignty barrier than that between two states within our union. Insurance Co. of North America v. Marina Salina Cruz, 649 F.2d at 1272. Two of the three defendants

named in counts two and three are residents of the Philippines. The government of the Philippines clearly has an interest in resolving disputes that involve its citizens. Nevertheless, we note that this factor is not dispositive because, if given controlling weight, it would always prevent suit against a foreign national in a United States court.

(17) We examine next Arizona's interest in adjudicating this dispute. Arizona has a strong interest in ensuring that its citizens are fully compensated for their injuries, in part to protect the state's economic resources from unnecessary expenditures. See Olsen By Sheldon v. Mexico, 729 F.2d at 651.

(18) At the current stage of the litigation, Arizona would appear to be the more efficient forum to resolve this dispute. Gates alleges, and defendants do

not dispute, that discovery is completed and "this matter could be tried in a matter of weeks." In addition, although parts of counts two and three may require the application of Philippine law, the proof of both counts may also involve the application of Arizona law. For example, Gates may attempt to prove the unreasonableness of defendants' alleged actions in count two, in part, by demonstrating that Gates properly terminated the distributorship agreement, which proof would require the application of Arizona law. The district court in Arizona is the more efficient forum to resolve such interpretations of Arizona law. See Hedrick v. Daiko Shoji Co., Ltd., Osaka, 715 F.2d at 1359; Raffaele v. Compagnie Generale Maritime, 707 F.2d 395, 399 (9th Cir.-1983); Insurance Co. of North America v.

Marina Salina Cruz, 649 F.2d at 1273.3

(19) An Arizona court certainly provides Gates with the most convenient forum for seeking relief. Unlike the individual plaintiff in Raffaele v. Compagnie Generale Maritime, 707 F.2d at 399, both parties here involve corporate entities apparently with sufficient resources to defend in either country. We therefore give some, but not significant, weight to this factor.

(20) The final factor we consider is the availability of an alternative forum. Gates alleges that it may not receive a fair trial in the Philippines because of the "well publicized violent upheavals"

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3 The Philippines, of course, may be the more efficient forum to apply possible Philippine law questions. Nevertheless, we conclude that Arizona is the more efficient forum because the action is almost ready for trial in Arizona.

there. We note that the "appellants must carry the burden of proving the unavailability of an alternative forum." Olsen By Sheldon v. Mexico, 729 F.2d at 651. We cannot say that Gates has satisfied this burden. In light of the other factors, however, this factor is not dispositive.

(21) After considering all the relevant actors, we conclude that, on balance, the exercise of limited personal jurisdiction over the defendants by a federal district court in Arizona is reasonable. The defendants' numerous visits to Tucson and Jensen's solicitation of the distributorship agreement there demonstrate a purposeful interjection into the state of Arizona. Moreover, defending counts two and three would not burden defendants significantly because they must litigate counts one and four in Arizona anyway. We place some, but not substan-

tial, weight on the convenience to Gates of litigating this dispute in Arizona. Finally, Arizona has an interest in adjudicating this dispute and, at this stage of the litigation, it is the more efficient forum.

In weighing these factors, we are not convinced that adjudication of this dispute in Arizona will affront the sovereignty of the Philippines. Although the availability of an alternative forum supports the defendants' position, the other factors weigh more strongly in Gates' favor. The district court in its order did not weigh these factors, nor did it examine whether the exercise of personal jurisdiction would be reasonable. Under the Data Disc three-prong inquiry, therefore, the district court erred in dismissing counts two and three for lack of personal jurisdiction.

B. Forum Non Conveniens

On November 1, 1983, the district court conditionally dismissed Gates' complaint under the doctrine of forum non conveniens. Because the district court had dismissed counts two and three for lack of personal jurisdiction one year earlier, this dismissal pertained only to counts one and four, which allege unauthorized use of Gates' tradenames and trademarks. The dismissal would require Gates to pursue relief in the Philippine courts.

Whether an action may be dismissed for forum non conveniens when jurisdiction is otherwise properly invoked is governed by the factors outlined in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09, 67 S.Ct. 839, 843, 91 L.Ed. 1055 (1947). The Court divided these factors into "private interest" and "public interest" factors,

each of which must be weighed by the district court. As this court has noted:

> The private interest factors include "the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive." ...

The public interest factors include the administrative difficulties flowing from court congestion; the local interest in having localized controversies resolved at home; the interest in having the trial of a diversity case in a forum that is familiar with the law that just govern the action; the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and the unfairness of burdening citizens in an

unrelated forum with jury duty.

Cheng v. Boeing Co., 708 F.2d 1406, 1409-10 (9th Cir.1983) (citations omitted), cert. denied, --- U.S. ----, 104 S.Ct. 549, 78 L.Ed.2d 723 (1983).

(22) If a district court properly analyzes and considers all relevant factors and its balancing of these factors is reasonable, its forum non conveniens dismissal "may be reversed only when there has been a clear abuse of discretion." Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257, 102 S.Ct. 252, 266, 70 L.Ed.2d 419 (1981). A district court, therefore, abuses its discretion when it fails to balance the relevant factors. La Seguridad v. Transytur Line, 707 F.2d 1304, 1308 (11th Cir.1983). "Emphasis on the district court's discretion ... must not overshadow the central principle of the Gilbert doctrine that 'unless the balance

is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' " Manu International, S.A. v. Avon Products, Inc., 641 F.2d 62, 65 (2d Cir.1981) (quoting Gulf Oil Co. v. Gilbert, 330 U.S. at 508, 67 S.Ct. at 843).

We conclude that the district court did not balance the important relevant factors. The balance of the public and private interest factors is not strongly in favor of the defendants. We therefore hold that the district court's dismissal of counts one and four for forum non conveniens was an abuse of discretion.

1. Private Interest Factors

(23) The district court failed to examine at least two important and

relevant private interest factors. [4] First, the district court did not recognize or consider in its balancing that Gates is a United States citizen and a resident of Arizona. A United States citizen has no absolute right to sue in a United States court. Mizokami Brothers of Arizona, Inc. v. Baychem Corp., 556 F.2d

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4 The district court correctly began its analysis with a determination of whether there exists an alternative forum. See Piper Aircraft Co. v. Reyno, 454 U.S. at 254 n. 22, 102 S.Ct. at 265 n. 22; Cheng v. Boeing Co., 708 F.2d at 1410; Pain v. United Technologies Corp., 637 F.2d 775, 784 (D.C.Cir.1980), cert. denied, 454 U.S. 1128, 102 S.Ct. 980, 71 L.Ed.2d 116 (1981). The court noted that a defendant's amenability to process in the other jurisdiction ordinarily satisfies this requirement. See Gulf Oil Co. v. Gilbert, 330 U.S. at 506-07, 67 S.Ct. at 842. We do not overturn the district court's finding of an alternative forum. That an alternative forum exists, however, is not dispositive in the balancing required in a forum non conveniens analysis.

975, 977 (9th Cir.1977) (per curiam), cert. denied, 434 U.S. 1035, 98 S.Ct. 770, 54 L.Ed.2d 783 (1978). The Supreme Court, however, has observed "that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum." Piper Aircraft Co. v. Reyno, 454 U.S. at 255, 102 S.Ct. at 265; see Koster v. Lumbermens Mutual Co., 330 U.S. 518, 524, 67 S.Ct. 828, 832, 91 L.Ed. 1067 (1947); Paper Operations Consultants International, Ltd. v. SS Hong Kong Amber, 513 F.2d 667, 672 (9th Cir.1975). Greater deference is due because "a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." Piper Aircraft Co. v. Reyno, 454 U.S. at 255 n. 23, 102 S.Ct. at 266 n. 23 (quoting Koster v. Lumbermens Mutual Co., 330 U.S. at 524,

67 S.Ct. at 832).

(24) The second relevant private interest factor the district court failed to examine is that the parties were ready for trial when it dismissed the complaint for forum non conveniens. The discovery deadline had passed; all documents needed for trial had been exchanged and/or identified; and all necessary trial documents were located in Tucson, Arizona. The central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient. Piper Aircraft Co. v. Reyno, 454 U.S. at 256, 102 S.Ct. at 266; La Seguridad v. Transytur Line, 707 F.2d at 1307. That trial preparation had progressed nearly to the point of trial certainly was a relevant factor when the district court considered whether trial of the case in Arizona would have been more "easy, expeditious and inexpensive" than

trial in the Philippines. See Gulf Oil Corp. v. Gilbert, 330 U.S. at 508, 67 S.Ct. at 843. Although no single factor is dispositive, we conclude that the district court's failure to weigh these private interest factors was an abuse of discretion.

(25) We also observe that the private interest factors mentioned by the district court do not strongly support the defendants' position on forum non conveniens. The district court noted that "the vast majority of the witnesses reside in the Philippines ...." Gates Learjet II, slip op. at 9. The defendants, however, admit that the district court was not absolutely correct. In fact, 23 of the 44 witnesses, whom the parties designated in response to interrogatories, reside in the Philippines, which is hardly a "vast majority."

Furthermore, the district court

improperly focused on the number of witnesses in each location. Instead, the court should have examined the materiality and importance of the anticipated witnesses' testimony and then determined their accessibility and convenience to the forum. See La Seguridad v. Transytur Line, 707 F.2d at 1308-09; Thomson & McKinnon v. Minyard, 291 F.Supp. 573, 576 (S.D.N.Y.1968). We also note that a district court should keep in mind that "the increased speed and ease of travel and communication ... makes, especially when a key issue is the location of witnesses, no forum 'as inconvenient (today) as it was in 1947,' " when the Supreme Court decided Gilbert. Manu International, S.A. v. Avon Products, Inc., 641 F.2d 62, 65 (2d Cir.1981). We are not convinced that the court here properly considered and weighed this

private interest factor. We therefore cannot give much deference to the district court's consideration of it.5

2. Public Interest Factors

In its consideration of public interest factors, the district court concluded that the Philippines "has a substantial interest in the outcome of the litigation." It reasoned that "most of the operating facts occurred in the

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5 In its discussion of private interest factors, the district court also noted that "almost all of the acts alleged in the complaints and counterclaims occurred in the Philippines." This observation, however, seems to pertain to the Philippines' interest in the action, which is a public interest factor. If the district court was instead referring to the convenience of obtaining certain evidence, it failed to explain what evidence was unavailable. As discussed above, most trial materials were located in Arizona at the time the district court dismissed counts one and four for forum non conveniens.

Philippines," and that "(t)he controversies will require the application of Arizona law and Philippine law." Gates Learjet II, slip op. at 10. Public interest factors properly considered include "the local interest in having localized controversies resolved at home," and "the interest in having the trial of a diversity case in a forum that is familiar with the law that must govern the action." Cheng v. Boeing Co., 708 F.2d at 1410.

(26) We nevertheless conclude that the district court's consideration of these public interest factors rested on a mistaken assumption about the applicable law and improperly ignored the advantages of an Arizona forum for the trial. In noting that both Philippine and Arizona law applied to this matter, the district court apparently considered all four counts of the Gates complaint. The

defendants' motion to dismiss for forum non conveniens, however, could pertain only to counts one and four because the court had already dismissed counts two and three for lack of personal jurisdiction.

Counts one and four allege unauthorized use and a conspiracy to make unauthorized use of Gates' tradename and trademark. These counts involve an interpretation of the international distributorship agreement entered into between Gates and LPI. Under the heading, "Post-Termination Actions," the distributorship agreement provides:

> The Distributor shall immediately discontinue the use of any trade names or trademarks referred to in Article III above and shall make no further use of the same nor any other name, title, expression or mark so nearly resembling such trade names or trademarks as to be deceptive in nature.

The distributorship agreement also specifically provides that it shall be

governed by Arizona law. Thus, counts one and four apparently are contract actions that require the application of Arizona law, not Philippine law.6

(27) In addition to making a mistaken assumption about the applicable law, the district court failed to weigh Arizona's interests in having the controversy "resolved at home." Arizona has a significant interest in interpreting its own laws. See Cheng v. Boeing Co., 708 F.2d at 1411. Arizona also has an interest in protecting its companies from trademark infringement abroad to preserve the state's economic vitality. Although the situs of the alleged trademark and tradename infringement was the Philippines, it appears that Philippine law is not applicable. We therefore conclude

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6 Defendants implicitly admit this point, conceding that Arizona law would apply to a contract action.

that these public interest factors should not weigh heavily in defendants' favor. A proper understanding of the applicable law and the relative interests, in fact, suggests that Arizona has the more substantial interest in this litigation.

(28) The district court particularly emphasized one public interest factor: the docket congestion of its court. It stated:

> Counsel have indicated that there are hundreds, if not thousands, of exhibits involved. There will be many witnesses testifying for both sides. The case will take weeks to try. The Tucson division of the District of Arizona is presently operating with two district judges. Normally there are three judges in the division. The two judges are handling all of the criminal calendar. Outside judges have been assigned to handle part of the civil calendar and it is contemplated that more help will be necessary in the future. Gates Learjet II, slip op. at 10.

This factor also should not weigh heavily in defendants' favor. The real issue is not whether a dismissal will reduce a court's congestion but whether a trial may be speedier in another court because of its less crowded docket. See Starnes v. McGuire, 512 F.2d 918, 932 (D.C.Cir.1974) (en banc); 15 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure s 3854 at 289-91 (1976); see also Foster v. Litton Industries, Inc., 431 F.Supp. 86, 88 (S.D.N.Y.1977) (relative docket conditions accorded some, but not decisive, weight in transfer motions). The district court here observed only that its docket was congested; it did not determine whether a trial would be speedier in the Philippines. Even if it were, however, it is unfair for a court to subject a United States corporation to the courts of another country merely because

plaintiff's home country courts are congested. The forum non conveniens doctrine should not be used as a solution to court congestion; other remedies, such as placing reasonable limitations on the amount of time each side may have to present evidence, are more appropriate. We hold that the district court failed to consider relevant private and public interest factors and misconstrued others. The district court therefore abused its discretion. On balance, we conclude that the relevant private and public interest factors support the district court's retention of jurisdiction and the dismissal of defendants' forum non conveniens motion.

III. CONCLUSION

Gates cannot demonstrate that the defendants had sufficient activity in

Arizona to establish general jurisdiction. Under the Data Disc three-prong inquiry into limited jurisdiction, however, we hold that the district court erred in dismissing counts two and three for lack of personal jurisdiction. As to the district court's dismissal of counts one and four for forum non conveniens, we find an abuse of discretion. The district court's orders are therefore

REVERSED AND THE CASE IS REMANDED.

[Dated September 27, 1984]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GATES LEARJET CORPORATION and GATES LEARJET EXPORT CORPORATION,	)	
Plaintiffs-Appellants,	)	No. 83-2643
vs.	)	District of Arizona
JAMES B. JENSEN, JR.; RICARDO S. TOMACRUZ; LEARJET PHILIPPINES, INC., a corporation; JAMES B. JENSEN & CO., INC., a corporation, and HAMIX INTERNATIONAL, LTD., a corporation,	)	O R D E R
Defendants-Appellees.	)	

Before: CHOY, PREGERSON, and REINHARDT, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. Fed.R.App.P.-35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[Dated November 27, 1984]